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NO 87-1855

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

THOMAS K. GILHOOL,

Petitioner

v.

RUSSELL A. MUTH, JR., et al.,

Respondent

On Writ of Certiorari
To The United States Court of Appeals
For the Third Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

In our main brief we outlined the authority and policies which support the conclusion that in enacting the EHA[1] Congress did not abrogate the Eleventh Amendment immunity of the States and that the Secretary of Education is an impartial reviewing officer.

In response, Muth argues: (1) that Eleventh Amendment jurisprudence should be overhauled by overruling Hans v. Louisiana, 134 U.S. 1 (1890), Br. for Resp. Muth p. 17; (2) that, in any case, Congress has abrogated the States' Eleventh Amendment immunity when it

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[1]Education for all Handicapped Children Act of 1975; Pub.L. No. 74-172, 20 U.S.C § 1400-1461.

enacted the EHA and the Rehabilitation Act Amendments of 1986,[2] Br. for Resp. Muth, p. 35, 37; (3) that the holding in Burlington School Committee of the Town of Burlington v. Department of Education, 471 U.S. 359 (1985) authorizes tuition reimbursement against the state, Br. for Resp. Muth p. 25; and (4) that the EHA imposes a higher standard of impartiality than other administrative law models and hence the Secretary of Education is precluded from reviewing education appeals, Br. for Resp. Muth p. 53.

Muth's view of Eleventh Amendment jurisprudence and the requisite standard of impartiality which the EHA demands in a reviewing officer misses the mark.

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[2]Rehabilitation Act Amendments of 1986, Pub.L. No. 99-506, 100 Stat. 1807 (1986), 42 U.S.C. § 2000d-7.

I. HANS V. LOUISIANA WAS CORRECTLY DECIDED AND SHOULD NOT BE OVERRULED.

In Hans v. Louisiana, the Court held that an unconsenting State cannot be sued in the federal courts by one of its own citizens, even if the case arises under the Constitution and laws of the United States. The Court based its holding, not so much on the Eleventh Amendment as such, but on the Constitution as it stood even before the Eleventh Amendment was adopted: "The truth is, that the cognizance of suits and actions [against unconsenting States] was not contemplated by the Constitution when establishing the judicial power of the United States." Id., at 15. As the Court has many times explained,

> That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against the State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.

Ex parte New York, No. 1, 256 U.S. 490, 497 (1921)(citations omitted), quoted in Atascadero State Hospital v. Scanlon, 473 U.S. 234, 239, n.2. Hans, and the long line of cases that follow it, establish not just a principle of State sovereign immunity but a structural

principle of federalism that recognizes the vital role of the States in our federal system. "A state's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued." Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 99 (1984)(footnote omitted, emphases in original).

In the century since it was decided, "the fundamental principle enunciated in Hans has been among the most stable in our constitutional jurisprudence." Welch v. Dept. of Highways and Public Transportation, No. 85-1716 (June 25, 1987), slip op. at 17 (plurality opinion). See Atascadero State Hospital v. Scanlon, supra, at 243-44, n.3 (collecting cases). Nevertheless, Muth asks the Court

to re-examine for the sixth time in three years, Hans and its progeny. Br. for Resp. Muth, p. 17-24. "Once again, [they] have placed in issue the fundamental nature of our federal system." Welch, supra, slip op. at 10 (plurality opinion). Muth bases his argument on 1) the asserted incorrectness of Hans on the basis of the historical record and 2) the "extremely awkward and occasionally absurd theoretical framework" that Hans allegedly has produced. Br. for Resp. Muth, p. 19. He is wrong on both counts.

A. Hans Was Correctly Decided.

The historical and legal underpinnings of the decision in Hans have been exhaustively recounted on many occasions, and there is no need to repeat that material here. See, e.g.,

Welch, supra, slip op. at 11-16 (plurality opinion); Edelman v. Jordan, 415 U.S. 651, 600-662; Hans, supra, at 12-14. Petitioner here reviews only the main headings of that support:

1. The text of Article III of the Constitution is at least as supportive of Hans as not. Article III, Section 2 extends the federal judicial power to all cases arising under the federal Constitution, laws and treaties, and (before the Eleventh Amendment) to controversies "between a State and citizens of another State." The question is whether these grants were subject to the implied immunity of States from suits by individuals, so as to reach only those cases where a State was a plaintiff or waived its immunity.

The broad language of the clauses in question contains no such limitation; nevertheless, this is exactly

the construction given to the equally broad clauses of the same section that extend the judicial power to "controversies to which the United States shall be a party" and to "all cases affecting ambassadors, other public ministers and consuls." Despite this broad language, the Court has recognized the United States' immunity from suit at least since United States v. McLemore, 4 How. 286 (1846); and no one, to Pennsylvania's knowledge, has ever suggested seriously that Article III abrogated diplomatic immunity. Nothing in Article III precludes a similar construction for cases involving the States, and indeed it is difficult to see why these similar clauses should not receive similar constructions.

2. During the debates on the ratification of the Constitution, Madison, Marshall and Hamilton all espoused the construction just discussed. Madison:

> [Federal] jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court.

3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 533 (2d ed. 1861). Marshall:

> I hope that no gentleman will think that a state will be called at the bar of the federal court.... It is not rational to suppose that the sovereign power should be dragged before a court. The intent

> is, to enable states to recover claims of individuals residing in other states.

Id., at 555.

Hamilton:

> It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation. It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.

The Federalist No. 81, p. 511 (B. Wright ed. 1961)(emphasis in original). These assurances, given in response to fears that the new federal courts would saddle the debt-heavy States with treasury-breaking liabilities, may well have been essential to the Constitution's ratification. Welch, supra, slip op. at 13-14.

3. Only four years after ratification, the Court, in Chisholm v. Georgia, 2 Dall. 419 (1793), rejected the view advanced by Madison, Marshall and Hamilton, and held that a private citizen could indeed drag a State before the federal courts. "The reaction to Chisholm was swift and hostile.... Within two years of the Chisholm decision, the Eleventh Amendment was ratified...." Welch, supra, slip op. at 14-15.

4. The Eleventh Amendment passed through Congress with little debate or dissent, but one incident deserves comment. The Senate rejected an amendment, offered by Senator Gallatin, that would have excepted from the Eleventh Amendment's bar "cases arising under treaties made under the authority of the United States." 4 Annals of Cong. 30 (1794).

The rejection of Gallatin's amendment refutes the suggestion that the Eleventh Amendment does not bar suits that are based upon the existence of a federal question. The federal government's interest in cases that arise under treaties, having as they do the potential to embroil the nation in international disputes, is even greater than its interest in cases arising under the federal Constitution or statutes. See The Federalist, No. 22, p. 197-98; No. 80, 500-01 (B. Wright ed. 1961). It therefore would be bizarre to suppose that the federal courts are empowered to entertain cases that arise under statutes but not cases that arise under treaties. And it would be still more bizarre to suppose that the federal courts, barred from hearing federal-question actions brought against a State

by citizen of other States, may nevertheless hear them when brought by a State's own citizens.

The text of the Constitution, the contemporary understanding of it at the time of ratification, the reaction to Chisholm, and the circumstances surrounding the adoption of the Eleventh Amendment--all support, if they do not compel, the conclusion that Hans was correctly decided. Certainly, nothing in the historical record compels the conclusion that it was not. Muth has simply failed to carry the heavy burden imposed on him by stare decisis. See Welch, supra, slip op. at 9.

B. Hans, Far From Having Produced an "extremely awkward and occasionally absurd theoretical framework" embodies a vital principle of federalism.

Despite the inadequacy of the evidence that Hans was incorrectly decided, Muth insists that Hans nevertheless should be overruled because, as he sees it, there is a need to clarify and rationalize Eleventh Amendment jurisprudence and the law of the States' immunity. Br. of Resp. Muth, p. 19.

While advocating an overhaul of Eleventh Amendment jurisprudence, Muth paradoxically acknowledges that the results achieved by the Court when it has applied the traditional Eleventh Amendment analysis are correct. Nevertheless, Muth asks the Court to reject this century-old analysis in favor of an analysis grounded on the doctrine of comity which he views as a more intellectually elegant tool for

analysis of federal/state interests. Br. of Resp. Muth p. 19-24. The Court should refuse his request.

1. In the first place, Muth's charge of doctrinal incoherency is not only untrue but irrelevant. Muth and the academics who support his position have forgotten that "[t]he life of the law has not been logic: it has been experience." O. Holmes, The Common Law 1 (1881). There is perhaps no area of the law where Holmes' celebrated epigram is so apt.

The hallmark of the Court's Eleventh Amendment jurisprudence is not a finicky intellectual tidiness but the practical accommodation of the competing state and national interests that are inherent in our federal system. The long line of decisions that follow Hans have developed a stable and predictable body of doctrine that is responsive to

these competing interests. Thus, the federal courts may order state officials to conform their future conduct to the requirements of federal law--a power necessary to vindicate the "supreme authority of the United States," Ex parte Young, 209 U.S. 123, 160 (1908)--but may not grant relief that would expend itself against a State's treasury, Edelman v. Jordan, 415 U.S. 651 (1974) --a prohibition which is directly responsive to the fears expressed in the ratification debates and which, when fulfilled in Chisholm, led to the adoption of the Eleventh Amendment. On the other hand, and in contrast to a Young-type case, a request for an order that a state official conform his or her conduct to state law implicates no federal interest, and the Eleventh Amendment therefore bars such

an action. Pennhurst State School & Hospital v. Halderman, supra, at 104-106.[3]

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[3]Other aspects of the Eleventh Amendment doctrine, and the ways in which they respond to the needs of our federal system, were summarized by Justice Powell in the plurality opinion in Welch, supra:

> The contours of state sovereign immunity are determined by the structure of requirements of the federal system.... First, the United States may sue a State, because that is "inherent in the Constitutional plan." Absent such a provision, "the permanence of the Union might be endangered.'" Second, States may sue other States, because a federal forum for suits between States is "essential to the peace of the Union." Third, States may not be sued by foreign states, because "[c]ontroversies between a State and a foreign State may involve international questions in relation to which the United

(FOOTNOTE CONTINUED ON NEXT PAGE)

To the extent that this body of doctrine includes legal fictions or anomalies --and that extent is much less than Muth would have the Court believe-- they are anomalies that are inherent in our federal system of dual sovereignty, which is itself an anomaly if one chooses to look at it that way.

(FOOTNOTE CONTINUED)

> States has a sovereign prerogative." Fourth, the Eleventh Amendment established "an absolute bar" to suits by citizens of other States or foreign States. Finally, "[p]rotected by the same fundamental principle [of sovereign immunity], the States, in the absence of consent, are immune from suits brought against them by their own citizens...."

Welch, supra, slip op. at 17-18 (citations omitted).

Its virtue is not its academic rigor, but its practical success in preserving for two centuries the liberties of a free people by diffusing the power of government.

In the second place, Muth's proposal asks the Court simply to read the Eleventh Amendment out of the Constitution, presumably on the ground that it is "awkward" and "absurb" and that his proposed comity analysis is better. Not suprisingly, he offers no textual warrant for this remarkable extension of judicial authority.

In the third place Muth's proposed comity analysis is a wholly inadequate substitute for the Eleventh Amendment and related doctrines. Comity is simply a courtesy extended by one sovereign to another; it is, at bottom, a matter of self-restraint on the part of the federal courts. There can be no

doubt that the States who ratified the Constitution and the Eleventh Amendment would have resisted relinquishment of their sovereign prerogatives in exchange for the discretionary courtesy which is the hallmark of the doctrine of comity.

The constitutional framework before and after the adoption of the Eleventh Amendment clearly grants States more than mere courtesy; it grants them the sovereign prerogative of immunity from suit.

II. WHEN CONGRESS ENACTED THE REHABILITATION ACT AMENDMENTS OF 1986 IT DID NOT INTEND TO SUBJECT STATES TO SUITS PURSUANT TO THE EHA.

1. As discussed in our opening brief, nothing in the language of the EHA or its amendments approaches the "unmistakably clear" expression of Congressional intent necessary to abrogate the States' Eleventh Amendment immunity. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985); Br. for Pet. p. 27-49. That argument need not be reiterated. Instead, we will address the theory, raised here for the first time and unaddressed by the lower courts, that the abrogation of immunity language in the Rehabilitation Act Amendments of 1986 applies to actions

brought pursuant to the EHA.[4] Br. for Resp. p. 35.

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[4] The Rehabilitation Act Amendments of 1986 provide in relevant part:

§ 2000d-7. Civil rights remedies equalization (a) General provision

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 794 of Title 29, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975 [42 U.S.C.A. § 1601 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

* * *

(b) Effective date

The provisions of subsection (a) of this section shall take effect with respect to violations that occur in whole or in part after October 21, 1986.

Muth and his amici reason that since the EHA is an anti-discrimination statute, it is embraced by the terms of the RHA amendments. This conclusion is flawed. First, the RHA amendments are not dispositive of Muth's claim because they became effective on October 21, 1986, long after Muth's cause of action arose. Muth attempts to deal with this fact by brushing it aside in a footnote, Br. for Resp. Muth, p. 37 n. 48, but it is fatal to Muth's argument.

Second, the EHA is much more than a mere anti-discrimination statute. It is an entitlement statute which imposes detailed, specific and affirmative obligations upon the States for the purpose of providing a free, appropriate education to handicapped children. By contrast, the RHA applies to a variety of federally funded activities and "neither the language,

purpose nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds." Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979). Admittedly, the common goal of the EHA and the RHA is to promote equal access of benefits to the handicapped. However, the obligations imposed upon grantees of federal funds differ materially under each statutory framework. The procedural and substantive remedies available to handicapped students under the EHA are not available under the RHA. Therefore, it is not surprising that in 1986 Congress abrogated the States' immunity in the anti-discrimination statutes while preserving that immunity under the EHA.

Third, it is noteworthy that while the EHA was amended to allow for recovery of attorneys fees--[5] at the very same time that the RHA amendments were being enacted-- Congress did not mention abrogation of the States' immunity. The conclusion is inescapable that Congress decided to abrogate immunity in one instance but not in the other. This result makes sense. The reprehensible nature of the discrimination proscribed by the RHA requires more severe sanctions than are required under the EHA, where violations occur because of differences in educational judgment rather than because of willful disregard for the child's welfare.

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[5]Handicapped Children's Protection Act, Pub.L. No. 99-372, 100 Stat. 796 (1986) 20 U.S.C. § 1415(e)(4)(G).

III. THE COURT IN BURLINGTON NEITHER CONSIDERED NOR NEEDED TO CONSIDER THE BAR OF THE ELEVENTH AMENDMENT IMMUNITY OF THE STATES WHEN IT AWARDED TUITION REIMBURSEMENT AGAINST A SCHOOL DISTRICT.

In their submissions, Muth and his amici argue that the one-year tuition damage award which the lower courts have imposed on Pennsylvania's Secretary of Education and the School District is nothing more than tuition reimbursement --a remedy authorized by the EHA and compelled here by the same equitable considerations which prompted the holding in Burlington School Committee of the Town of Burlington vs. Department of Education, 471 U.S. 359 (1985). Their reading of Burlington misconstrues the decision in crucial respects.

1. In Burlington, the Court held that the EHA grants a reviewing court the authority to reimburse parents for expenditures on private special educational placement if the court ultimately determines that such placement, rather than the IEP proposed by public school authorities, is proper under the Act.[6] Burlington, 471 U.S. 359 at 369. Implicit in the Court's holding are the findings (1) that the

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[6]20 U.S.C. § 1415(e)(2) provides in relevant part that:

> [T]he court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

parents' unilateral choice in educational placement was appropriate and (2) that the school district's IEP was not an appropriate placement. These findings distinguish Burlington from this case where the factual record is quite the reverse. Here, neither of the lower courts found that Alex's private school placement at Landmark was appropriate, and both lower courts found that the school district's 1983-84 IEP, if implemented, would have provided Alex an appropriate education.[7] Pet. App. 21a-28a; 145a-155a.

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[7]See Br. of Resp. Central Bucks School District, pgs. 23-28 for facts supporting the conclusion that but for Muth's June 1983 invocation of the stay-put provision of 20 U.S.C. § 1415(a)(3), the school district's IEP conference proposals would have been formalized into an IEP for the 1983-84 school year. The fact that a hearing examiner did not vindicate the School District's judgment until 1984 is not relevant; an appropriate educational placement was available to Alex at all times in the Central Bucks School District.

2. Another critical distinction makes Burlington inapplicable here. In Burlington the Court did not need to, and did not consider, the effect of the States' Eleventh Amendment immunity because reimbursement relief was being sought only against the school district, an entity which is not protected by constitutional immunity.[8] Despite this crucial Eleventh Amendment burden, Muth argues strenuously that that the rationale in Burlington is controlling. He stresses that the purpose of the EHA cannot be achieved unless the courts can impose a reimburse-

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[8]In reaching the holding that reimbursement was an appropriate remedy, the Court in Burlington relied on legislative history which focused on the local educational agency and the parents as participants in the due process hearing where financial responsibility was an issue. Id. 471 U.S. at 372.

ment remedy against the State in those situations where it is the State, and not the school district, which is directly involved in creating a child's IEP or approving private school placement.[9] (Br. for Resp. Muth 40-41) The answer obviously is that unless the Court first finds abrogation

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[9]The number of handicapped children who allegedly will be denied a reimbursement remedy because they are educated in state schools is speculative, exaggerated, and not helpful to the Court in deciding this case which does not deal with reimbursement but rather, with damages awarded for procedural violations. Moreover, there is nothing in the record to establish the number of children who actually do attend state schools and who, in turn, seek private school placement which is, in turn, found to be appropriate while the state school's IEP is found to be inappropriate. Such a line of conjecture is obviously beyond the scope of this record.

of the States' immunity in the language of the EHA, the power of a federal court in granting "such relief as it determines appropriate" is necessarily limited by the constitutional barrier of the Eleventh Amendment.[10]

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[10]Muth's insistence that there must be a reimbursement remedy against the State rests ultimately on the proposition that allowing injured persons to sue for compensation is not merely a good thing, but is an overriding value of such transcendent importance that it deserves to override constitutional doctrine. Only a moment's thought is necessary to dispel this fallacy. There are any number of areas where competing social values outweigh the need for compensation, producing immunities of one kind or another. E.g., United States v. McLemore, supra (sovereign immunity); Imbler v. Pachtman, 424 U.S. 409 (1976)(prosecutorial immunity); Stump v. Sparkman, 435 U.S. 349 (1978)(judicial immunity); Nixon v. Fitzgerald, 457 U.S. 731 (1982) (presidential immunity); Harlow v. Fitzgerald, 457 U.S. 800 (1982)(executive branch immunity); Hustler Magazine v. Falwell, No. 86-1278 (February 24, 1988)(First Amendment immunity).

3. Moreover, while reimbursement is an appropriate remedy in a situation such as presented in Burlington, it is far from being the only remedy provided by the EHA. That statute imposes extensive procedural requirements which guarantee that parents will have input into the decisions regarding the education of a handicapped child. 20 U.S.C. § 1401 (19); See, Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 181-82 (1982). This procedural framework guarantees parents an opportunity to contest any decision made by the State regarding the child's identification, evaluation, or educational placement through administrative procedures and, if necessary, in court proceedings. 20 U.S.C. § 1415. As noted by this Court in Rowley, the EHA's emphasis on procedural

safeguards, evidences a Congressional intention that "adequate compliance with the procedures described would in most cases assure much if not all that Congress wished in the way of substantive content in an IEP." Rowley 458 U.S. at 206. In addition, the EHA provides that a State's failure to comply with its provisions may result in withholding of federal funds for the program. 20 U.S.C. § 1416. Certainly, the threat of such a penalty is the best possible incentive for the State to comply with the EHA and results in the most effective available remedy for handicapped children.

4. Finally, it is clear that the tuition award granted Muth is not reimbursement but is, in effect, a punitive damage award because the

Secretary of Education remanded and participated in the review process. However, there is no evidence in this record of actual bias on the part of the Secretary as reviewing officer or that in adapting a judicial tool to the administrative arena he knew that he was violating the EHA. Neither of the procedural defects deprived Muth of his right to participate fully in formulation of his child's IEP; nor did they deprive him of notice of his rights under the Act. Mr. Muth did not suffer any harm because of these procedural defects. Even if we were to consider this award without regard to the jurisdictional bar of the Eleventh Amendment, Mr. Muth does not deserve to recover damages against the Secretary.

IV. THE EHA DOES NOT EXPRESS CONGRESSIONAL INTENT TO DEPART FROM TRADITIONAL CONCEPTS OF IMPARTIALITY IN EDUCATIONAL DUE PROCESS HEARINGS.

Muth's argument on the issue of the Secretary's impartiality requires only brief commentary to supplement our submission in the main brief.[11]

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[11]Muth suggests that the Court need not reach the issue of the Secretary's impartiality because a second procedural violation found by the courts below and unappealed by the Secretary (delay caused by the remand), independently supports the award of damages. Br. for Resp. Muth p. 50. Muth misunderstands the issues here. In the Court of Appeals, petitioner also challenged the district court's award of attorneys fees on the grounds that the district court had not followed the standand established by the Court in Hensley v. Eckerhart, 461 U.S. 424 (1983). The Court of Appeals agreed and remanded with instructions that Muth's attorney's fee recovery be limited to issues upon which he had prevailed. [Pet. App. pgs. 78a-82a] It is therefore relevant, for purposes of determing Muth's attorney's fee award, for the Court to address the issue of the Secretary's impartiality.

1. Muth's suggestion that traditional concepts of impartiality, which serve administrative bodies affecting vital areas of every citizen's life, are not applicable in the education context is unsupported both by the statute and by common sense. There is no indication in the language, purpose, or legislative history of the EHA that Congress believed that educational decision-makers are peculiarly predisposed to biased behavior. Congress wisely provided that hearings be conducted by individuals "not involved in the education of the child"; however, this criterion does not impute bias to the Secretary who supervises the educational system for of hundreds of thousands of children but is not directly involved in providing them an education.

It is nonsense to suggest that a higher level of impartiality is required of education decision-makers than of welfare decision-makers who, in determining eligibility for medical and subsistence benefits, hold in balance the very survival of those who come before them.

In determining the level of impartiality which the EHA requires, the Court should be guided by the principle established in Goldberg v. Kelly, 397 U.S. 254, 271, (1970) where the Court said that:

> ...prior involvement will not necessarily bar a welfare official from acting as a decision-maker. He should not, however have participated in making the determination under review.

The Secretary's only prior involvement in matters that come before him for review would be his participation in formulating educational policy. He is

far removed from disputes which arise in connection with the formulation of an appropriate IEP in a particular case. To assume that the Secretary will be biased in favor of the school district in a dispute over a child's IEP defies logic and common sense, presuming bad faith without any factual basis. Implicit in such an assumption is that the Secretary, who has sworn to uphold the Constitution and laws of his State and of the United States, will ignore the mandate of the law and the guidance of the courts in interpreting that law.

It is respectfully suggested that such an assumption is not tenable as a matter of principle.

2. Muth and his amici go on to argue that participation of the Secretary, or his counterpart, in the review process is a practice found in only a few States. However, the issue

before the Court merits consideration in light of Congressional intent as expressed in the EHA, it should not be decided by a show of hands from the participating States.

The position taken by the United States Department of Education [DOE] in an informal letter of January 16, 1984 [Br. of Amici for Resp. Exhibit B] is similarly irrelevant because it is not part of the record.[12]

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[12]Although an agency's interpretation of the statute under which it operates is entitled to some deference, the Court has said that "this deference is constrained by our obligation to honor the clear meaning of the statute, as revealed by its language, purpose and history." Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979). Quoting Teamsters v. Daniel, 439 U.S. 551, 566 n.20 (1979).

Moreover, we note that the interpretation of the DOE on this issue has been neither consistent nor longstanding.

(FOOTNOTE CONTINUED ON NEXT PAGE)

(FOOTNOTE CONTINUED)

Apparently, until court decisions held otherwise, the agency had consistently approved State plans in which the Secretary or his counterpart participated in the review process. It officially altered its position after these court decisions came to its attention; therefore, this Court should give no more deference to the agency position than it does to the opinions of the lower courts. Finally, the agency itself does not seem completely persuaded by these decisions since it has continued to approve State plans, such as Pennsylvania's, which incorporate this system. These facts substantially diminish the force of the agency's position and consequently diminish the deference to be given to DOE's present interpretation of the statute.

CONCLUSION

For the foregoing reasons, petitioner asks the Court to reverse the judgment of the Court of Appeals.

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